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9
10 UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 THOMAS A. WAITE,

13 Plaintiff,

14 vs.

15 CORPORATION OF THE PRESIDING)
16 BISHOP OF THE CHURCH OF JESUS)
17 CHRIST OF LATTER DAY SAINTS, a)
18 Utah corporation; CORPORATION OF)
19 THE PRESIDENT OF THE CHURCH OF)
20 JESUS CHRIST OF LATTER DAY)
SAINTS, a Utah corporation; DONALD C.)
FOSSUM; and STEVEN D. BROADHEAD,)

21 Defendants.)

)
Case No.: CV-05-399-EFS

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PLAINTIFF'S SURREPLY TO
DEFENDANTS' MOTION TO
COMPEL

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27 PLAINTIFF'S SURREPLY TO DEFENDANTS'
MOTION TO COMPEL - 1

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1 Plaintiff, by and through his counsel Stephen L. Nordstrom and Richard C.
 2 Eymann, hereby submits the following surreply in opposition to the Church Defendants'
 3 Motion to Compel Discovery Response.

4 Plaintiff has not objected to Defendants' use of work product which, as intended,
 5 was previously provided by the Plaintiff during Mr. Ryan's deposition as well as in
 6 declaration form, (Declaration of James T. Ross). Because this information was
 7 intentionally disclosed to the Defendants, the work product protection is waived as to this
 8 information. *In Re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860
 9 F.2d 844, 846 (8th Cir. 1988).

10 Moreover, Plaintiff acknowledges that this holding is consistent with the quotation
 11 referenced in *Wright, Miller & Marcus*, § 2024, set forth on page 4 of Defendants' reply
 12 brief. However, it appears Defendants inadvertently omitted the last sentence when
 13 quoting from *Wright, Miller & Marcus*. That quotation, including the last sentence, reads
 14 as follows:

15 ... If documents otherwise protected by the work product rule
 16 have been disclosed to others with an actual intention that an
 17 opposing party may see the documents, the party who made the
 18 disclosure should not subsequently be able to claim protection
 19 for the documents as work product. *But disclosure of some*
documents does not destroy work-product protection for other
documents of the same character.

20 *Wright, Miller & Marcus*, § 2024 at 209 (emphasis added).

21 Although Plaintiff intentionally disclosed some information to Defendants, that
 22 disclosure does not destroy the work product protection for Plaintiff's undisclosed
 23 memoranda or notes of witnesses' oral statements gathered during or in preparation of
 24 litigation. See *Upjohn Co. v. United States*, 449 U.S. 383, 399, 101 Sup. Ct. 677, 66, L.
 25 Ed. 2d 584 (1981); *In Re Firestorm 1991*, 129 Wn.2d 130, 159, 916 P.2d 411 (1996).

1 Plaintiff's counsel also take issue with the Second Affidavit of Brian T. Rekofke in
2 Support of Motion to Compel, filed April 30, 2007. [Ct. Doc. #104] As set forth in the
3 Second Declaration of Richard C. Eymann filed herewith, the characterizations of
4 Mr. Rekofke as to the conversations between counsel are not shared by Mr. Eymann. Be
5 that as it may, under the authority cited above, there is no basis to compel the requested
6 response of plaintiff to defendants' discovery requests.

7
8 DATED this 11th day of May, 2007.
9

10 NORDSTROM & NEES, P.S.
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12 By: s/Stephen L. Nordstrom
13 STEPHEN L. NORDSTROM, WSBA #11267
14 Co-counsel for Plaintiff
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2 CERTIFICATE OF SERVICE
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5 I, Richard C. Eymann, hereby certify that on the 11th day of May, 2007, I
6 electronically filed the foregoing with the Clerk of the Court using the CM/ECF System
7 which will send notification of such filing to the following participants:
8

9 Brian T. Rekofke
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12 Spokane, WA 99201-0302

13 Andrew C. Smythe
14 Paine Hamblen Coffin Brooke & Miller
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17 _____
18 s/Richard C. Eymann
19 RICHARD C. EYMANN
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